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In the Supreme Court of the United States

OCTOBER TERM, 1994

NORMA I. ACEVEDO-VILLALOBOS, ET AL.,
PETITIONERS

v.

RAFAEL HERNANDEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction over the district court judgment dismissing the complaint, because petitioners' notice of appeal therefrom was untimely filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 22 F.3d 384. The opinion and order of the district court (Pet. App. C1-C10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1994. A petition for rehearing was denied on June 7, 1994 (Pet. App. B1-B2), and the petition for a writ of certiorari was filed on August 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are former employees of the Puerto Rico Public Housing Administration (PRPHA). On July 15, 1992, petitioners filed a complaint in federal district court in the Commonwealth of Puerto Rico against various Commonwealth and federal agencies and officers. The complaint challenged a May 1992 agreement between the Commonwealth and the United States Department of Housing and Urban Development (HUD) under which the Commonwealth and HUD agreed to expedite the privatization of the management of federally funded housing projects in Puerto Rico, and to decentralize the PRPHA. Pet. App. A4, A7. Petitioners, who sought injunctive, declaratory, and monetary relief, alleged that the agreement had caused the transfer to private contractors of the administration and maintenance of those projects, resulting in the layoff of a large percentage of the PRPHA's employees. *Id.* at A5-A7. The court of appeals summarized the "major themes" (*id.* at A7) of petitioners' complaint as follows (*id.* at A7-A8):

> First, plaintiffs allege that the privatization agreement is invalid (and consequently that the layoffs were illegal) because it was entered into in violation of both Puerto Rico and federal law, and that the various local and federal defendants acted *ultra vires* by signing the agreement. * * * Next, plaintiffs allege that they had a property interest in their jobs, and that they were deprived of this property interest without due process. Finally, plaintiffs maintain that a Puerto Rico official made

derogatory comments about them in public, thereby depriving them of "liberty" without due process.[1]

On October 27, 1992, the Commonwealth defendants moved to dismiss the complaint on a number of grounds, including failure to state a claim upon which relief could be granted. Pet. App. A8. On January 11, 1993, the United Stat moved to dismiss on behalf of the federal defendants. *Id.* at G3.

2. On January 15, 1993, the district court issued an opinion and order granting the Commonwealth defendants' motion to dismiss (Pet. App. C1) and issued a separate judgment dismissing petitioners' entire complaint (*id.* at D1). The court explained that the complaint "fails to provide the Court with a clear idea of the contours of their claims and also fails to provide appropriate support for their allegations," and "is infected with conclusory allegations and unfounded accusations." *Id.* at C5-C6, C-9. Those rulings were entered on the district court docket on January 19, 1993, along with entries noting "Case closed" and "CASE sent to closed file." *Id.* at G4.

On February 1, 1993, petitioners filed a motion styled, "MOTION FOR RECONSIDERATION AND OR TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e) AND REQUEST OF RELIEF FROM JUDG-

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[1] Other PRPHA employees and their union filed a similar suit against the Commonwealth and the federal defendants in the Superior Court of Puerto Rico. The case was removed to federal district court. The district court dismissed all claims against the federal defendants for failure to state a cause of action, and it remanded the case insofar as it involves claims against the Commonwealth defendants. *American Federation of Pub. & Private Employees* v. *Commonwealth*, Civ. No. 92-1948 (D.P.R. Nov. 23, 1993). We have been informed that the case is pending.

MENT UNDER RULE 60(b)(6) AND REQUEST TO AMEND COMPLAINT," together with a proposed amended complaint. Pet. C.A. App. 131, 145. On the same date, petitioners also filed a memorandum of law in support of their motion to amend the complaint. *Id.* at 167. On March 3, 1993, the district court denied petitioners' motion for reconsideration and to amend the complaint. Pet. App. E1. That order was entered on the docket on March 9, 1993. *Id.* at G8-G9. Also on March 3, 1993, the district court issued an order declaring moot petitioners' motion to extend the time within which to respond to the federal defendants' motion to dismiss. *Id.* at G7.

On March 15, 1993, petitioners filed a second motion for reconsideration. Pet. C.A. App. 213. On April 21, 1993, the district court denied that motion. Pet. App. F1. The denial was entered on the district court docket the following day. *Id.* at G8-G9.

3. On May 14, 1993, petitioners filed a notice of appeal. Pet. App. G9. The notice was filed 64 days after entry of the order denying their first motion for reconsideration and 22 days after entry of the order denying their second motion for reconsideration. *Id.* at A13.

4. The court of appeals held that petitioners' appeal was untimely and that the court therefore lacked jurisdiction over the appeal. Pet. App. A1-A31. Under Fed. R. App. P. 4(a)(1), the court explained, a party appealing from a judgment or order of a district court in a case to which "the United States or an officer or agency thereof is a party" must be filed within 60 days of the notice of entry of the judgment or the order. Under Fed. R. App. P. 4(a)(4), a timely motion to alter or amend judgment made under Fed. R. Civ. P. 59(e) tolls the time for filing the notice of appeal, which then starts to run from the entry of the order denying such motion. Pet.

App. A12. In this case, the court pointed out, the notice of appeal was filed more than 100 days after entry of the judgment dismissing the complaint, and 64 days after entry of the order denying the motion for reconsideration. Thus, the court concluded, "even with the benefit of Rule 4(a)(4)'s tolling provision, plaintiffs' notice of appeal was seemingly late. We lack jurisdiction over late appeals." *Id.* at A13.

The court of appeals also rejected petitioners' contention that the judgment dismissing the complaint was not a "final decision" under 28 U.S.C. 1291 that triggered the 60-day deadline to file a notice of appeal, and that the district court's "final decision" was in fact its denial of the second motion for reconsideration. Pet. App. A13-A14.[2] The court noted that the courts of appeals had applied different standards for determining when dismissal of a complaint (as distinguished from dismissal of an action) is a final appealable order. The Seventh and Ninth Circuits had held that dismissal of a complaint is final only if "the trial court has made clear in dismissing the complaint that the action could not be saved by amendment." *Id.* at A14-A15 (citing *Benjamin* v. *United States*, 833 F.2d 669, 672 (7th Cir. 1987), and *Ruby* v. *Secretary of United States Navy*, 365 F.2d 385, 387 (9th Cir. 1966), cert. denied, 386 U.S. 1011 (1967)). The Eleventh Circuit had held that an order dismissing a complaint is final unless "the plaintiff could not have been reasonably expected to realize that the court was entering a final order." Pet. App. A15 (quoting *Czeremcha* v. *International Ass'n of Machinists*, 724 F.2d 1552, 1555 (11th Cir. 1984)). And the Second and

[2] Had the district court agreed with that argument, the notice of appeal, filed 22 days after denial of the second motion for reconsideration, would have been timely.

Eighth Circuits had held that an order dismissing a complaint is final and appealable absent express grant of leave to amend. Pet. App. A15 (citing *Weisman* v. *LeLandais*, 532 F.2d 308, 309 (2d Cir. 1976), and *Quartana* v. *Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986)). Adopting the standard used by the Second and Eighth Circuits, the court of appeals held that the dismissal of the complaint in this case was final, because the district court had not expressly granted leave to amend. Pet. App. A20.

In the court's view, several factors made a finding of finality particularly appropriate in this case. First, any leave to amend the complaint as a matter of right pursuant to Fed. R. Civ. P. 15(a) had terminated upon dismissal of the complaint. Pet. App. A20. Second, the dismissal had been set forth in a separate document, as required for final judgments under Fed. R. Civ. P. 58. Pet. App. A20. Third, "plaintiffs, as evidenced by their Rule 59(e) motions, apparently understood the judgment to be final." *Id.* at A20-A21. Finally, dismissal of the complaint accorded with this Court's definition of a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at A21 (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981)). The court explained (Pet. App. A21-A22):

> Here the complaint was dismissed by the district court for failure to state a claim, and judgment was then entered on the docket and set forth on a separate document in accordance with Fed. R. Civ. P. 58 and 79(a). Accordingly, the dismissal of plaintiffs' complaint possesses all of the markings of a "final decision."

Finally, the court of appeals rejected petitioners' claim that the second motion for reconsideration had extended the time period for filing a notice of appeal. Pet. App. A22-A23 ("[i]t is well settled that a motion for reconsideration served more than ten days after the entry of judgment does not affect the time for appealing from that judgment"). The court of appeals also held that the district court correctly dismissed the second motion for reconsideration for lack of jurisdiction, on the ground that the motion was untimely filed. *Id.* at A30.[3]

ARGUMENT

1. Petitioners urge review to resolve the circuit conflict noted by the court of appeals regarding the circumstances under which the dismissal of a complaint constitutes an appealable final decision. Pet. 20-33. This case, however, is not an appropriate one in which to resolve that conflict, because it is clear that under any of the standards used by the courts of appeals, the order dismissing petitioners' complaint would have been considered final and hence appealable, rendering petitioners' notice of appeal untimely.

As the court below noted (Pet. App. A14-A15), the courts of appeals have adopted three distinct standards for determining when dismissal of a complaint becomes final. It adopted the view of the Second and Eighth Circuits that, absent an express grant of leave to amend, an order dismissing a complaint is final and appealable. *Id.* at A15; see *Weisman* v. *LeLandais*, 532 F.2d 308, 309 (2d Cir. 1976); *Quartana* v. *Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986). Petitioners do not dispute that that

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[3] Petitioners do not argue in this Court that the court of appeals erred in affirming the district court's denial of the second motion for reconsideration.

standard was properly applied here, since the district court, in dismissing the complaint, conferred no express grant of leave to amend.

The Third, Sixth, Seventh, and Ninth Circuits, by contrast, have held that the dismissal of a complaint, as distinguished from the dismissal of an action, is final only if the district court has made it clear in dismissing the complaint that the action could not be saved by amendment. Pet. App. A14-A15; see *Benjamin* v. *United States*, 833 F.2d 669, 672 (7th Cir. 1987); *Borelli* v. *City of Reading*, 532 F.2d 950, 951-952 (3d Cir. 1976); *Azar* v. *Conley*, 480 F.2d 220, 222-223 (6th Cir. 1973); *Ruby* v. *Secretary of United States Navy*, 365 F.2d 385, 387 (9th Cir. 1966), cer. denied, 386 U.S. 1011 (1967). Given the actions taken by the district court in this case, the dismissal of the complaint would plainly have been held final under that standard as well. In dismissing the complaint, the district court entered a separate judgment granting the pending motion to dismiss, and also caused the notation "Case closed" (Pet. App. G4) to appear on the case docket. To the extent any ambiguity remained after the court took those steps, it was eliminated when the district court, on March 3, 1993, denied petitioners' first motion for reconsideration and their concomitant motion to file the proposed amended complaint. Those actions made clear that, in dismissing the complaint, the district court intended to dismiss with prejudice and preclude amendment of the complaint. See *Benjamin*, 833 F.2d at 672; *Ruby*, 365 F.2d at 387. Yet not until more than 60 days after the first motion for reconsideration and the motion to amend the complaint were denied did petitioners file a notice of appeal. The court of appeals thus properly held under Fed. R. App. P. 4(a)(1) that it lacked appellate jurisdiction. See *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978)

(time limits under Fed. R. App. P. 4(a) are "mandatory and jurisdictional").[4]

Finally, the Fifth and Eleventh Circuits have held that an order dismissing a complaint is not final if "the plaintiff could not have been reasonably expected to realize that the court was entering a final order." *Czeremcha* v. *International Ass'n of Machinists*, 724 F.2d 1552, 1555 (11th Cir. 1984); see also *Whitaker* v. *City of Houston*, 963 F.2d 831, 834-835 (5th Cir. 1992). The district court's actions in this case—including denoting the case as "closed," denying reconsideration, denying the motion to file a proposed amended complaint, and declaring "moot" petitioners' motion for additional time to respond to the federal respondents' motion to dismiss—gave petitioners more than ample notice that the court was entering a final order. Indeed, as the court of appeals observed, "plaintiffs, as evidenced by their Rule 59(e) motions, apparently understood the judgment to be final" (Pet. App. A20-A21), yet failed to file a timely notice of appeal even after the denial of the first of those motions.

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[4] Given their failure to file a timely notice of appeal even after denial of their motion to file the proposed amended complaint, petitioners' reliance on purportedly ambiguous language in the district court's opinion dismissing the complaint regarding the possibility of amendment (Pet. 13, 36) is unavailing. The action of the district court in refusing to reconsider its earlier ruling or to accept an amended complaint clearly established the finality of its dismissal. Also immaterial is petitioners' claim (Pet. 26) that the district court was initially ambiguous about whether it was dismissing the complaint as to all parties or only the Commonwealth respondents. As the court of appeals noted (Pet. App. A11 n.3), the district court's declaration that petitioners' motion for an extension of time to reply to the United States' motion to dismiss was moot made it apparent that the complaint had been dismissed in its entirety.

In sum, there is no basis for concluding that petitioners' appeal would have been found to have been filed within 60 days of a final district court order under any of the standards employed by the courts of appeals. Thus, this case does not present a suitable vehicle for addressing the circuit conflict on the finality issue identified by petitioners.

2. Also unavailing is petitioners' contention (Pet. 33-35) that review is warranted to address a purported circuit conflict on the issue of whether a plaintiff retains the right to amend a complaint once as a matter of course under Fed. R. Civ. P. 15(a) after the district court has granted a motion to dismiss. Rule 15(a) provides that a plaintiff may amend a complaint once "as a matter of course at any time *before a responsive pleading is served*" (emphasis added). In this case, the federal respondents had answered the complaint (Pet. App. G2-G3) by the time petitioners moved to amend the complaint. Whether or not a dismissal alone would have terminated petitioners' right to amend, once a responsive pleading had been served, petitioners were permitted to amend only by leave of court. Accordingly, the issue giving rise to the circuit conflict identified by petitioners is not presented in this case.[5]

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[5] Petitioners also claim (Pet. 37-39) that the court below erred in interpreting the district court's dismissal as relating to all parties and not just the state defendants. Thus, petitioners argue (Pet. 38), the decision below conflicts with cases in which dismissal of some but not all claims (or parties) was held not to be a final decision. Petitioners ignore the fact that the United States moved to dismiss, and that the district court made clear that it had dismissed the entire complaint as it related to all parties. Pet. App. D1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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